

DECISION

Date of adoption: 14 September 2011

Case No. 2010-06

Latif Fanaj

Against

EULEX

The Human Rights Review Panel, sitting on 14 September 2011 with the following members present:

Mr. Antonio BALSAMO, Presiding Member
Ms. Magda MIERZEWSKA, Member
Ms. Anna BEDNAREK, Member

Assisted by
Mr. John J. RYAN, Senior Legal Officer
Ms. Leena LEIKAS, Legal Officer
Ms. Stephanie SELG, Legal Officer

Having considered the aforementioned complaint, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel of 9 June 2010,

Having deliberated, decides as follows:

PROCEDURE

1. The complaint was registered on 8 September 2010.
2. On 8 December 2010 the Panel requested the Head of Mission (HOM) EULEX to forward to it copies of the UNMIK decisions on the termination of the various investigations in the case. Those investigations were referred to in the complaint and in the accompanying documents. The response was received on 24 January 2011 together with some of the other requested documents.

3. On 9 February 2011 the Panel requested the UNMIK Special Representative of Secretary General (SRSG) to provide copies of the police investigation report prepared by UNMIK in the matter. According to the response of 22 March 2011 all files relating to the case had been transferred from UNMIK to EULEX on 23 December 2008.
4. On 29 March 2011 the Panel Secretariat requested permission from EULEX to examine the entire case file. On 14 April 2011 such permission was granted. The Panel Secretariat examined the case file on 11 May 2011.
5. In the meantime, on 23 February 2011 the Panel decided to give notice of the complaint to the HOM, inviting him to submit written observations on the admissibility and merits of the complaint. It was also decided to examine the merits of the application at the same time as its admissibility (Rule 30 paragraphs 1 and 2 of the Rules of Procedure of the Panel, hereafter ROP).
6. The observations of the HOM were received on 21 June 2011 after which they were communicated to the complainant for his additional observations.
7. The complainant did not reply to the request for observations. He had been informed that if no reply is received by due date, the Panel may decide on the matter on the basis of the existing information.

FACTS

I. CIRCUMSTANCES OF THE CASE

8. The facts of the case, as submitted by the parties and as they appear from the publicly available documents, may be summarized as follows.

Background

9. The complainant is the brother of Mr. Hasan Fanaj, who died, together with Mr. Ardian Thaqi, Mr. Mentor Mehmetaj, Mr. Sinan Demolli and Mr. Hamez Hasani, in Dubravë/Dubrava Prison on 4 September, 2003.

Incident in Dubravë/Dubrava Prison

10. On 4 September 2003, around 12.30 hours, a number of inmates in Dubravë/Dubrava Prison attacked unarmed prison guards and barricaded the entrance to the cell block in order to prevent the guards from entering. The inmates thereafter requested, inter alia, improved living conditions from the prison management but no agreement was reached on these issues.

11. At about 22.45 an intervention team started to remove mattresses which had been used by the inmates as a barricade. Prisoners set fire to these mattresses. Five inmates died as a result of the inhalation of toxic fumes and injuries sustained in the ensuing fire.

Investigation by the UNMIK prosecutor, the UNMIK Central Criminal Investigation Unit (CCIU) and the UNMIK Police Component

12. On 5 September 2003 the UNMIK prosecutor requested examination and autopsies on the bodies of the five deceased inmates.
13. On 7 September 2003 the UNMIK CCIU published its report on the preliminary investigation of the incident.
14. On 22 September 2003 the UNMIK Police Component initiated a criminal investigation into the incident entitled Causing General Danger through Fire being Grave Acts against General Security and Resulting in Murder.
15. On 10 August 2004 the UNMIK prosecutor requested that the UNMIK investigators expand the scope of the investigation to include possible criminal conduct or criminal negligence by the Penal Management Division or other UNMIK employees. However, this recommendation was ignored by UNMIK authorities.

Investigation by the Dubravë/Dubrava Commission

16. UNMIK SRSG established the Dubravë/Dubrava Commission, (hereafter "the Commission") on 10 September 2003 in order to, inter alia, establish the events of 4 September, 2003 and the facts and circumstances that had led up to them.
17. The Commission reviewed the manner in which the incident had been addressed by the authorities; the prisoners' complaints and the reasons for the incident; the contingency plan for addressing prison unrest; previous prison incidents; inmate conditions as well as management and prison training.
18. The Commission completed its review on 4 November, 2003 with the publication of a report in which it made thirty nine (39) recommendations in order to establish good prison management standards in the prison.

Complainant's requests for information from Dubravë/Dubrava Commission

19. On 19 November 2003, the complainant requested the Commission to furnish all documentation concerning the case together with the report of the Commission in the Kosovo Albanian language. This request was referred to the SRSG for a decision.
20. On 28 January 2004, the complainant was provided with a copy of the Commission report but all the other material was considered

confidential in accordance with the Terms of Reference of the Commission and he was denied access to it.

21. On 13 October 2004, the complainant was informed that as a result of the findings of the Commission's report, a criminal investigation was being conducted by an international prosecutor in Pejë/Peć.

Complainant's requests for information on proceedings

22. On 14 March 2005, the complainant requested information on the criminal investigation from the UNMIK Department of Justice (DOJ). On 6 April 2005, he was informed that the investigation was still in progress and that the international prosecutor was examining the police investigation reports.
23. On 18 December 2006, the complainant requested information on the progress of the case from the public prosecutor in Pejë/Peć. In February 2007, he was informed that the public prosecutor had no information on the incident of 2003 in Dubravë/Dubrava Prison and that the complainant should consult the international prosecutor who was in charge of the investigation.
24. On 16 February 2007, the complainant's case was registered with the Ombudsperson Institution.
25. On 30 August 2007, the complainant again requested information from the UNMIK DOJ. He was informed by a letter of 11 September 2007 that the findings of the investigation were still under review. The same reply was given to the Ombudsperson's inquiries to DOJ on 27 September 2007.
26. On 9 October 2007 the international prosecutor in charge of the case offered to meet with the relatives of the victims. It seems that no such meeting took place.
27. On 2 September 2008, in a letter to the DOJ, the complainant expressed his concern about the length of the proceedings. On 15 October 2008 the complainant was advised to contact the international prosecutor.
28. On 28 April 2010 the Acting EULEX Chief Prosecutor informed the complainant that his office was obtaining updated details on the case and that a meeting with the complainant could be organized in late May 2010. This meeting took place in early June 2010.

Preparation of prosecution by the international prosecutors

29. On 17 December 2007 the international prosecutor filed with a pre-trial judge in Pejë/Peć a decision to initiate an investigation against fifteen prisoners allegedly involved in the incident. This ruling was registered on 11 January 2008 with the pre-trial judge.

30. On 9 June 2008 the pre-trial judge extended the time allocated for the investigation until 9 December 2008. It is not known whether or not this extension was renewed in December 2008.
31. On 9 December 2008 EULEX took over responsibility from UNMIK for pending legal cases and police investigations with certain exceptions. The documentation related to the complainant's case was handed over officially to EULEX on 23 December 2008 (see paragraph 3 above).
32. On 16 July 2010 the EULEX Prosecutor terminated the proceedings against the prisoners, finding that there was no justified suspicion that the defendants had committed criminal offences.
33. The decision was based on the assessment of the interviews and statements made by witnesses during the investigation conducted by the UNMIK prosecutors and police. A total of 98 prisoners, 19 prison guards and four (4) international staff members had been interviewed during various stages of the investigation by the police and the prosecutor. The prosecutor noted that the witnesses did not know who had started the riot or the fire. Several witnesses who had incriminated a number of the defendants while being interviewed by the police had not been able to confirm their statements later on, before the prosecutor.
34. The prosecutor concluded that the evidence gathered during the investigation allowed to make factual findings as to the consequences of the riot and fire, but did not provide any detailed findings as to the individual guilt of the suspects. There was no clear indication that the suspects had been acting in a deliberate and intentional manner. In order for the suspects to be charged with the offences it was necessary to establish that they should have foreseen the outcome of the events. As the available evidence did not indicate that the suspects had been acting with a criminal intent, no charges could be brought against them.
35. The complainant was informed of the decision by a letter dated 16 July 2010. He had the option of either submitting a written application for an extension of the investigation to a pre-trial judge or filing an indictment against the defendants before the District Court within eight (8) days of the receipt of the notification of the termination of the investigation.

II. RELEVANT APPLICABLE LAW

Joint Action

36. Articles 2 and 3 of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (hereafter: Joint Action), for their relevant parts, read as follows:

Article 2 Mission Statement

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

EULEX KOSOVO, in full cooperation with the European Commission Assistance Programs, shall fulfill its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.

Article 3 Tasks

In order to fulfill the Mission Statement set out in Article 2, EULEX KOSOVO shall:

(a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;

...

(d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

(e) contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organised crime;

(f) contribute to the fight against corruption, fraud and financial crime;

...

(i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming;

Law on Jurisdiction

37. The Law on Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo (No. 03/L-053, hereafter: the Law on Jurisdiction), and more specifically its Articles 7 and 8, regulate the integration and jurisdiction of the EULEX judges and prosecutors in the judicial and prosecutorial system of Kosovo.

Article 7 General authority of EULEX prosecutors

7.1 EULEX prosecutors will have the authority and responsibility to perform the functions of his or her office, including the authority to conduct criminal investigations and take responsibility for new and pending criminal investigations or proceedings, within the SPRK¹ or within the prosecution offices to which he or she is assigned to by the Chief EULEX Prosecutor and according to the modalities as established by the present Law and by the Assembly of the EULEX Prosecutors.

...

7.4 EULEX prosecutors will discharge their functions in compliance with the applicable law. They will be under the exclusive authority of the Chief EULEX Prosecutor and will not be subject to the authority of any Kosovan institution.

¹ SPRK= Special Prosecution Office of the Republic of Kosovo

Article 8 Competences of EULEX prosecutors in Kosovo

8.1 The EULEX prosecutors will be competent to investigate and prosecute the crimes, that fall under the exclusive competence of the SPRK in accordance with the law that establishes the SPRK, and the crimes, including the attempt and the various form of collaboration to the crimes, listed in all items of paragraph 3 of Article 3 of this law.

Provisional Criminal Procedure Code Of Kosovo

38. The Provisional Criminal Procedure Code of Kosovo (RA 2003/26, hereafter PCPCK), regulates in its Articles 221, 224 and 225 the work of the public prosecutor before the case becomes pending before a court.

Article 221

(1) The investigation shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom an investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.

...

Article 224

(1) The public prosecutor shall terminate the investigation if at any time it is evident from the evidence collected that:

- 1) There is no reasonable suspicion that a specific person has committed the indicated criminal offence;

...

(2) The public prosecutor shall within eight days of the termination of the investigation notify the injured party of this fact and the reasons for this (Article 62 of the present Code). The public prosecutor shall immediately inform the pre-trial judge about the termination of the investigation.

Article 225

(1) If the investigation is not completed within a period of six months, the public prosecutor shall submit to the pre-trial judge a written application supported by reasoning for an extension of the investigation.

(2) The pre-trial judge may authorize an extension of the investigation for up to six months if this is justified by the complexity of the case. The pre-trial judge may authorize another extension for up to six months for criminal offences punishable by at least five years of imprisonment. In exceptional cases the Supreme Court may authorize a further extension of up to six months.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

A. Complaints

39. The complainant alleges violations of The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950, hereafter “the Convention”) as well as The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984).
40. The complainant claims that neither UNMIK nor EULEX conducted adequate investigations into the incident in the Dubravë/Dubrava Prison. He further claims that no findings have been confirmed on the persons responsible for the death of his brother and the other four prisoners.
41. From the facts of the case it is understood that the complainant alleges violations of Article 2 of the Convention (right to life) and in particular of its procedural obligation for the State to investigate the causes of the deaths. The Panel will examine the case under the said Article alone.
42. The relevant provision of the Convention reads as follows:

Article 2 Right to life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

B. Submissions by the HOM EULEX Kosovo

43. In his submissions the HOM notes that the Panel does not have inherent jurisdiction but that it is bound by the EULEX OPLAN (a document classified as *EU Restrained*, which cannot be publicly released) and its subsequent interpretation by the HOM.
44. The HOM is of the view that decisions of the EULEX prosecutors are part of the judicial proceedings, which do not fall under the mandate of the Panel, as stated in the Panel’s ROP, Rule 25, paragraph 1.
45. Furthermore, the HOM states that the Panel is not an additional level of judicial review and any decision made by the EULEX prosecutors or Kosovo prosecutors may be challenged through the local legal

avenues. In this case one such avenue would be that the complainants file a notification of intent to continue prosecution as a subsidiary prosecutor.

46. The HOM points out that international human rights law is directly applicable in Kosovo and may be used to challenge decisions made by public authorities before the Constitutional Court by way of a constitutional complaint.
47. Lastly, the HOM refers to the Panel's decision in the case of *Cyma Agovic v. EULEX* (2010-16, Decision of 7 December 2010) in which the Panel found that it lacked competence to examine the complaint because it concerned judicial proceedings conducted before the courts of Kosovo. The HOM argues that the same approach applies *mutatis mutandis* to the current complaint.
48. The HOM concludes that the complaint is manifestly ill-founded and should be declared inadmissible. In any event, the standard of duty of care required from a State Party with regard to the conduct of an effective investigation when deaths occur under suspicious circumstances has not been breached in such a way that it would be attributable to EULEX staff or its agents.

C. General comments on admissibility

General conditions of procedural admissibility

49. Before considering the complaint on its merits the Panel has to decide whether to accept the complaint, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure (ROP).

Compliance with six-month requirement

50. The complaint was lodged on 8 September 2010, thus within three months from the date when the Panel could receive complaints (8 June 2010) and also within six months from the decision given in the case by EULEX prosecutor (16 July 2010).

The complainant's failure to reply

51. The Panel notes that the complainant failed to reply to the observations by the HOM. The Panel considers that the proper examination of the complaint, in the light of Article 6 of the Convention, would normally require that both parties' arguments are submitted to it in adversarial proceedings.
52. However, the Panel is of the view that respect for human rights require that the examination of the case be continued; the more so as the current complaint is essentially the same and relates to the same set of facts as complaints brought by four other complainants and raising identical legal issues.

The Panel's jurisdiction with regard EULEX prosecutors' decisions

53. The Panel can only examine complaints relating to human rights violations by EULEX Kosovo in the conduct of its executive mandate in the justice, police and customs sectors as outlined in Rule 25, paragraph 1 of its ROP.
54. According to the said Rule, based on the accountability concept in the OPLAN of EULEX Kosovo, the Panel cannot review judicial proceedings before the courts of Kosovo.
55. Judicial proceedings to which the guarantees derived from Article 6 of the Convention apply are to be understood as those being conducted by an independent and impartial tribunal within the meaning of this provision.
56. In this connection, the Panel notes that the competences of EULEX prosecutors are mainly defined in the "Law on Jurisdiction" as well as in the "Law on the Kosovo Special Prosecutors Office (SPRK)".
57. The EULEX prosecutors, in addition to performing monitoring, mentoring and advising activities of the EULEX Rule of Law Mission in Kosovo, exercise executive powers by conducting criminal investigations and by prosecuting new and pending cases, as defined in Articles 7 and 8 of the Law on Jurisdiction (see paragraph 37 above).
58. Furthermore, under the PCPCK, Article 221, a criminal investigation shall be initiated by a public prosecutor's decision. The six (6) month investigation period begins to run from the date of such decision. The said ruling is sent to the pre-trial judge who is, in accordance with Article 225 of the PCPCK, empowered to grant an extension of that period, if requested by the prosecutor. Persons under investigation are not under indictment, nor are they necessarily informed of such investigation.
59. After the investigation has been concluded, the prosecutor decides whether to continue the proceedings by filing an indictment with the court of first instance or to discontinue the investigation.
60. The Panel emphasizes that on many occasions the European Court of Human Rights (hereafter "the Court") has held that a public prosecutor cannot be regarded as an officer exercising "judicial power" within the meaning of Article 5 § 3 of the Convention (see *Merit v. Ukraine*, no. 66561/01, §§ 62-63, 30 March 2004; *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 125, ECHR 2005-II (extracts); *Niedbala v. Poland*, no. 27915/95, § 53, 4 July 2000). Even less so can a public prosecutor be considered to be endowed with the judicial attributes of "independence" and "impartiality" (see *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, pp. 12-17, §§ 27-41).

61. As the Court has pointed out, the legal framework within which interventions of public prosecutors are taken lack the guarantees of judicial procedure (such as, inter alia, participation of the persons concerned, the holding of hearings, publicity, adversarial character, equality of arms between the parties etc). The prosecutors make decisions on their own motion and enjoy considerable discretion in determining the course of action to be pursued, but they are normally hierarchically subordinated to a higher prosecutor.
62. The mere fact that appeals can be made against the prosecutors' decisions to a hierarchically higher prosecutor cannot neither compensate for the lack of judicial guarantees nor be identified with such guarantees. Furthermore, the fact that the prosecutors act as guardians of the public interest cannot be regarded as conferring on them a judicial status of independent and impartial actors (see ECHR, *Zlínstat, spol. s.r.o., v. Bulgaria*, no. 57785/00, § 78, 15 June 2006).
63. The Panel observes that no arguments have been submitted to it in the present case to demonstrate that the institutional and procedural position of EULEX prosecutors is such as to confer on them an independent judicial status, comparable to that enjoyed by courts.
64. Therefore the actions or omissions by the prosecutors during the investigative phase of criminal proceedings may not be considered as being made in the context of "judicial proceedings".
65. **For these reasons the Panel holds that the actions of a EULEX prosecutor taken while examining a case are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel's mandate as long as no indictment has been filed with a court competent to examine the merits of a case.**

Article 2 of the Convention – general principles in ECHR case law

66. Article 2 of the Convention is one of its most fundamental provisions. The object and purpose of the Convention as an instrument for the protection of individual human beings require that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see, among other authorities, *Anguelova v. Bulgaria*, no. 38361/97, § 109, ECHR 2002-IV).
67. The first sentence of Article 2 § 1 obliges the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III; *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII; and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II).

68. However, the positive obligation to safeguard life is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources (see, amongst other authorities, *Keenan v. the United Kingdom*, no. 27229/95, § 90, ECHR 2001-III, and *A. and Others v. Turkey*, no. 30015/96, §§ 44-45, 27 July 2004).
69. Having regard to its fundamental character, Article 2 of the Convention imposes also a procedural obligation on the authorities to carry out an effective investigation into alleged breaches of the substantive limb of these provisions (see, among other authorities, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 298, 24 March 2011).
70. Article 2 does not concern only deaths resulting from the use of force by agents of the State. The procedural obligation referred to above calls for an effective judicial system which can determine the cause of death and bring those responsible to account (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I; *Vo v. France* [GC], no. 53924/00, § 89, ECHR 2004-VIII; and *Šilih v. Slovenia* [GC], no. 71463/01, § 192, 9 April 2009; *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007). The authorities must therefore ensure, by all means at their disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished (see *Zavoloka v. Latvia*, no. 58447/00, § 34, 7 July 2009).
71. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see *Velcea and Mazăre v. Romania*, no. 64301/01, § 105, 1 December 2009).

Temporal jurisdiction

72. In accordance with the general rules of international law, namely Article 28 of the Vienna Convention on the Law of Treaties, the provisions of any convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party (see ECHR, *Blečić v. Croatia* [GC], § 70; *Šilih*, cited above, § 140; *Varnava and Others v. Turkey* [GC], § 130).

73. According to Rule 25, paragraph 2 of its ROP the Panel will only examine complaints concerning alleged human rights violations that occurred after 9 December 2008 in Kosovo.
- 74. Therefore, the Panel's temporal jurisdiction only covers the period after EULEX became operational on 9 December 2008.**
75. The Panel may, however, have some regard to facts which occurred prior to that date because of their causal connection with subsequent facts which form the sole basis of the complaint submitted to the Panel (see, *mutatis mutandis*, *Šilih*, cited above, § 141).
76. In this connection, the Court has observed that the procedural obligation to carry out an effective investigation under Article 2 constitutes a separate and autonomous duty. It can therefore be considered an independent obligation arising out of Article 2, capable of binding the authorities even when the death took place before the critical date (see, *inter alia*, *Šilih*, § 159; *Varnava and Others*, § 147; and *Velcea and Mazăre*, § 81, all cited above). The procedural obligation under Article 2 binds the public authorities throughout the period in which they can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it (see *Šilih*, cited above, § 157).
77. Furthermore, there must be a genuine connection between the death and the date marking the beginning of the Panel's jurisdiction for the procedural obligations imposed by Article 2 to come into effect. In practice, this means that a significant proportion of the procedural steps required by this provision have been, or should have been, carried out after the critical date (see also *Velcea and Mazăre*, cited above, §§ 83-85; *Tuna v. Turkey*, no. 22339/03, §§ 58-60, 19 January 2010; *Çakir v. Cyprus (dec.)*, no. 7864, 29 April 2010).
- 78. Hence, in order for the Panel's temporal jurisdiction to arise in a case in which the deaths occurred before the critical date of 9 December 2008, it must be established that a significant proportion of the procedural steps under Article 2 of the Convention were or ought to have been carried out after the establishment of the EULEX and by EULEX.**

D. Panel's assessment of the complaint

Complaints with regard to actions or omissions by UNMIK

79. The complaint originates in an incident that took place in Dubravë/Dubrava Prison under UNMIK administration in 2003. The investigation into the cause of the incident was duly completed and the Commission published its report on 4 November, 2003 (see paragraph 18 above).

80. Taking into consideration Rule 25 of its ROP, which limits the Panel's mandate to complaints relating to human rights violations committed by EULEX Kosovo, the Panel observes that it lacks jurisdiction to examine actions or omissions by UNMIK. It is therefore not for the Panel to make a legally binding assessment thereof.
81. However, the Panel notes, firstly, that the Commission established the facts concerning the incident in its report. The Commission noted certain deficiencies and shortcomings in prison management, prison conditions, prison operational procedures and the training of prison staff. The Commission consequently made thirty nine (39) recommendations with regard to security in the prison, inmates' conditions, staff training as well as UNMIK management relationships especially with local staff and other agencies (see paragraphs 17 and 18 above).
82. Secondly, the Panel notes in this context that the UNMIK prosecutor recommended that the scope of the investigation should be extended so as to cover also possible offences or criminal negligence on the part of the prison staff (see paragraph 15 above). However, this recommendation was not followed and no relevant investigation was subsequently initiated. The Panel finds this failure to act on the recommendation to be regrettable.
83. **Nonetheless, in so far as it is understood that the present complaint concerns the actions or omissions of UNMIK, the Panel, having regard to the limits of the scope of its jurisdiction *ratione personae*, declares it inadmissible.**

Complaints with regard to the investigation and prosecution of the prison authorities

84. The Panel observes that the complainant claims, in essence, that the EULEX authorities had not discharged their obligation flowing from the procedural limb of Article 2 of the Convention, which required them to conduct an adequate and effective investigation into the death of his son. The procedural claim is not related to the alleged failings in the investigation or any subsequent legal proceedings but to the alleged complete absence of any investigation into the responsibility of the prison authorities for his brother's death.
85. In this connection, the Panel notes that in December 2008, when EULEX assumed responsibility from UNMIK, approximately five (5) years had elapsed since the incident. The pending proceedings instituted by UNMIK and subsequently taken over by EULEX concerned only the investigation in respect of possible criminal offences committed by the prisoners. At no time was any investigation conducted, beyond the Commission's report referred to above, in respect of possible criminal liability on the part of persons acting in their capacity of the prison authorities.

86. For the EULEX actions and/or omissions to be considered under the requirement of procedural obligations emanating from Article 2 of the Convention, there should be a continuous link between the deaths that occurred in 2003, the investigation that followed and the time when EULEX assumed responsibility for the matter in 2008.
87. Moreover, it must be established that a significant proportion of the procedural steps were or ought to have been carried out after EULEX assumed responsibility for the investigation (see paragraphs 74-77 above).
88. As it is, it has not been shown or even claimed that EULEX conducted any investigation with regard to the prison authorities' responsibility in the incident.
89. In the absence of any investigation conducted by the UNMIK concerning possible criminal liability on the part of the prison authorities in respect of the events concerned and having regard to the temporal scope of the Panel's jurisdiction, it can not be said that there is a continuous link, as mentioned above in paragraph 76, which would create an obligation under Article 2 of the Convention for EULEX to commence, at present, an investigation in respect of the authorities' responsibility for the events concerned.
90. In any event, this finding is closely intertwined with the finding made above to the effect that EULEX has no mandate to examine acts or omissions by UNMIK as to their alleged incompatibility with human rights standards.
91. **The Panel finds that this part of the complaint is incompatible *ratione temporis* with its terms of jurisdiction and finds it inadmissible.**

Complaints with regard to the prosecution of the prisoners

92. The decision to conduct an investigation against fifteen prisoners was lodged with a pre-trial judge on 17 December 2007 (see paragraph 29 above) by an UNMIK prosecutor. EULEX assumed responsibility from UNMIK for the continuation of the investigation of the 15 prisoners in December 2008.
93. The EULEX prosecutor assigned to the case discontinued the investigation in July 2010 on the ground that there was no reasonable suspicion that the suspects had a case to answer.
94. The Panel has already found that the actions and omissions of EULEX prosecutors occurring after 8 December 2008, in particular in the absence of any subsequent judicial proceedings relating to the same facts, before the filing of indictment fall within the ambit of the executive mandate of EULEX (see paragraph 64 above).

95. **The Panel, therefore, finds this part of the complaint with regard the prosecution of the prisoners admissible within the meaning of Rule 29 of its Rules of Procedure.**
96. As to the substance of this part of the complaint, the complainant submitted, in essence, that the EULEX prosecuting authorities had not discharged their obligation flowing from the procedural limb of Article 2 of the Convention, which required them to conduct an adequate and effective investigation into the cause of his brother's death, in so far as it could be assumed that it was caused by acts of other inmates.
97. In this regard, the Panel notes that the investigation concerning the prisoners' criminal liability in connection with the prison riot of 2003 was the responsibility of the UNMIK Police and later the UNMIK prosecutor. The Panel is of the view that this investigation was reasonably thorough and comprehensive and the resulting findings have been recorded in considerable detail. The investigation comprised the collection of statements of witnesses including prisoners, prison guards and international staff members as well as the collection of technical evidence.
98. Subsequently, a EULEX prosecutor assumed responsibility for the case in December 2008. After an examination of the case file and an assessment of the evidence gathered by the UNMIK investigation, the EULEX prosecutor decided to discontinue the investigation.
99. The Panel finds that the prosecutor's decision, as summarized in paragraphs 32-34 above, shows that there was a genuine attempt, based on the existing investigation material gathered by the UNMIK authorities, to establish the relevant facts and identify the persons from among the prisoners responsible for the deaths of five inmates.
100. In particular, the prosecutor analyzed the evidence given by 98 prisoners, 19 prison guards and four (4) international staff members who had been heard during various stages of the investigation by the police and the prosecutor.
101. Furthermore, the injured parties, including the families of the deceased prisoners, had the option of continuing the prosecution (see above, paragraph 35). To the Panel's knowledge the complainants did not do so. In any case, those proceedings would only have concerned the prisoners, not the prison authorities.
102. **The Panel, therefore, finds that EULEX discharged its responsibilities with regard to this investigation. Consequently, there has been no violation of Article 2 of the Convention in this regard.**

FOR THESE REASONS, THE PANEL UNANIMOUSLY

- *Declares* that it lacks competence under Rule 25 of its Rules of Procedure to examine the complaints with regard to actions and omissions by UNMIK, and declares them **inadmissible**;
- *Declares* the complaints under Article 2 of the Convention, with regard to the EULEX actions or omissions concerning the investigation of the conduct of the prison authorities **inadmissible**;
- *Declares* the complaints under Article 2 of the Convention, with regard to the EULEX actions in the investigation concerning the prisoners' criminal responsibility **admissible**, and
- *Holds* that there has been **no violation** of Article 2 of the Convention by EULEX in the exercise of its executive mandate in this regard.

For the Panel,


John J. RYAN
Senior Legal Officer



Antonio Balsamo
Presiding Member

